IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DOMENIC GRECO	:	CIVIL ACTION
	:	
v.	:	
	:	
THE PAUL REVERE LIFE INSURANCE COMPANY	:	NO. 97-6317

MEMORANDUM AND ORDER

YOHN, J. January , 1999

In his complaint, plaintiff Dominic Greco alleges that when defendant, The Paul Revere Life Insurance Company ("Paul Revere"), terminated disability insurance payments to Greco, it breached its contract with plaintiff, violated Pennsylvania's Unfair Insurance Practices Act, and acted in bad faith. Pending before the court is defendant's motion for partial summary judgment on plaintiff's claim of bad faith in Count II of his complaint. Because the court finds that plaintiff has produced sufficient evidence to present the issue of bad faith to the jury, defendant's motion for summary judgment will be denied.

BACKGROUND

Dominic Greco submitted an application for and was issued the insurance policy in question in 1988. The policy allowed plaintiff to recover benefits in the event that plaintiff

became "unable to perform the important duties of [his] occupation" and was also under the care of a physician. See Plaintiff's Counterstatement of Material Facts, Exhibit A, Attachment A, 1988 Insurance Policy, ¶ 1.9, Definition for "Total Disability". Under the terms of the policy, Greco's occupation was "the occupation in which [he was] regularly engaged at the time [he] became Disabled." See id. at ¶ 1.8, Definition for "Your Occupation". On his application, plaintiff listed his occupation as "psychologist/marriage & family counselor." Id., 1988 Insurance Policy Application, Part 1(B). Plaintiff described the duties of his occupation as "marriage & family counseling." Id.

In 1995, plaintiff submitted a claim for total disability due to depression. Defendant paid benefits to Greco for two years during which time plaintiff was required to submit monthly progress reports containing information from him as well as his attending physician. In 1997, Paul Revere requested that plaintiff undergo an evaluation by an independent medical examiner. The independent medical examiner chosen by Paul Revere was Dr. David Raskin. On March 3, 1997, Dr. Raskin submitted a report to Paul Revere in which he stated in summary that

> Dr. Domenic Greco has experienced a significant depressive disorder with accompanying symptoms of anxiety and phobic responses to work and to social situations. More intensive and more specialized psychopharmacology for these conditions is indicated. These conditions do not appear, based on the mental status examination, to interfere with his working in job settings other than a high volume private practice environment.

Id. Exhibit A, Attachment C, Letter Report to Andrew Carlson from David E. Raskin.

On May 30, 1997, Paul Revere sent a letter to Greco terminating his disability benefits. Id., Exhibit A, Attachment B, Letter from Lucy E. Baird to Dominic Greco. In the letter, defendant cited the result of Raskin's examination as the basis for closing Greco's claim. See id. Plaintiff filed suit in Pennsylvania state court in September 1997. Defendant, a Massachusetts

corporation, removed the case to federal court.

In Count II of his complaint, plaintiff alleges bad faith under 42 Pa. Cons. Stat. § 8371. Greco cites the following bases for this claim: defendant selected a physician biased in favor of insurance companies to conduct the independent medical examination; defendant provided incorrect and incomplete information to Dr. Raskin regarding the relevant standard for total disability under the terms of the insurance policy; defendant was reckless in relying solely upon Dr. Raskin's report to discontinue benefits and furthermore, misinterpreted the import of the doctor's report; defendant recklessly disregarded records from plaintiff's treating physician which supported a finding that plaintiff was disabled; and no supervisor reviewed the decision of the claim representative to terminate plaintiff's payments, as was required by company policy. See Complaint at 8-10; Plaintiff's Mem. of Law in Supp. of Pl.'s Opposition to Def.'s Mot. for Partial Summ. J., at 7-11.

Defendant argues in its motion for partial summary judgment that the evidence shows that Greco misrepresented and omitted facts on his monthly progress reports thus breaching his duty of good faith to the insurer, Paul Revere. Def.'s Mem. of Law in Support of the Mot. for Summ. J. at 4, 6. Because of these misrepresentations, defendant claims that it had a reasonable basis to deny plaintiff's claim for benefits or at the very least that it has created a jury issue in that regard which entitles it to summary judgment on the bad faith claim. Id. at 6-7. Moreover, defendant contends that the reports from Raskin and plaintiff's attending physician state that plaintiff was able to perform the important duties of his occupation and thus was not disabled. Id. at 8.

SUMMARY JUDGMENT STANDARD

Summary judgment is to be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56 (c). The court should not resolve disputed factual issues, but rather, should determine whether there are factual issues which require a trial. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). If no factual issues exist and the only issues before the court are legal, then summary judgment is appropriate. See Sempier v. Johnson & Higgins, 45 F.3d 724, 727 (3d Cir.), cert. denied, 515 U.S. 1159 (1995). If, after giving the nonmoving party the "benefit of all reasonable inferences," id. at 727, the record taken as a whole "could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial,'" Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986), and the motion for summary judgment should be granted.

Plaintiff brings his claim for bad faith under 42 Pa. Cons. Stat. § 8371. The statute provides that:

> In an action arising under an insurance policy, if the court finds that the insurer has acted in bad faith toward the insured, the court may take all of the following actions:
>
> (1) Award interest on the amount of the claim from the date the claim was made by the insured in an amount equal to the prime rate of interest plus 3%.
>
> (2) Award punitive damages against the insurer.
>
> (3) Assess court costs and attorney fees against the insurer.

42 Pa. Cons. Stat. Ann. § 8371. Because the statute does not define bad faith, Pennsylvania state courts and federal courts applying Pennsylvania law have adopted the following Black's Law Dictionary definition of bad faith in the insurance context:

> 'Bad faith' on part of insurer is any frivolous or unfounded refusal to pay proceeds of a policy; it is not necessary that such refusal be fraudulent. For purposes of an action against an insurer for failure to pay a claim, such conduct imports a dishonest purpose and means a breach of a known duty (i.e. good faith and fair dealing), through some motive of self-interest or ill-will; mere negligence or bad judgment is not bad faith.

Terletsky v. Prudential Prop. & Cas. Ins. Co., 649 A.2d 680, 688 (Pa. Super. Ct. 1994) (quoting Black's Law Dictionary 139 (6th ed. 1990)); see Polselli v. Nationwide Mut. Fire Ins. Co., 23 F.3d 747, 715 (3d Cir. 1994) (same).

To succeed at trial, plaintiff must prove bad faith by clear and convincing evidence. Terletsky, 649 A.2d at 688. This is a higher burden of proof than a preponderance of the evidence. Under this heightened standard, plaintiff "must show that the defendant did not have a reasonable basis for denying benefits under the policy and that the defendant knew or recklessly disregarded its lack of reasonable basis in denying the claim." Id. See Polselli, 23 F.3d at 751 (affirming district court's determination that bad faith can exist when the insurer "knew or recklessly disregarded the lack of a reasonable basis for denying the claims"). Plaintiff's higher burden of proving bad faith at trial also affects his burden in opposing summary judgment. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 254-55 (1986) ("the determination of whether a given factual dispute requires submission to a jury must be guided by the substantive evidentiary standards that apply to the case"); Eisenberg v. National Union Fire Ins. Co. of Pittsburgh, No. 97-5591, 1998 WL 404053, at *7 (E.D. Pa. July 9, 1998) (holding that under Pennsylvania's clear and convincing standard for proving bad faith by an insurer, plaintiff has heightened burden in opposing summary judgment). Thus, to defeat a motion for summary judgment, plaintiff must present sufficient evidence such that, if believed, a jury could find bad faith under the clear and

convincing standard.[1] See Anderson, 477 U.S. at 254; Polselli, 23 F.3d at 750-51; Eisenberg, 1998 WL 404053 at *7.

DISCUSSION

Defendant claims that the deposition testimony and documents submitted by defendant, prove that defendant had two reasonable bases for terminating plaintiff's benefits. Defendant first contends that plaintiff failed to provide complete or honest answers to questions on the

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[1] Defendant's position that summary judgment is warranted where reasonable minds could differ on the issue of bad faith is untenable as it clearly conflicts with the established summary judgment standard. Defendant relies on Montgomery v. Federal Ins. Co., 836 F. Supp. 292 (E.D. Pa. 1993) and J. H. France Refractories Co. v. Allstate Ins. Co., 578 A.2d 468 (Pa. Super. Ct. 1990) to support this contention. Defendant's reliance is misplaced. In Montgomery, the court held that it had to grant the summary judgment motion because the plaintiff had failed "to establish that defendant's denial was unreasonable or that reasonable minds could even differ on that issue." Montgomery, 836 F. Supp. at 298. Clearly the court anticipated that in the event that a plaintiff could demonstrate that reasonable minds could differ on the issue of the reasonableness of defendant's basis for denying benefits, then summary judgment would be inappropriate.

As further support, defendant relies on the Pennsylvania Superior Court's decision in J. H. France Refractories. In that case, the plaintiff claimed that the defendant had acted in bad faith when it contested its obligation to defend the plaintiff against various asbestos suits that had been filed against it. J. H. France Refractories v. Allstate Ins. Co., 626 A.2d 502, 510 (Pa. 1993). At the time of the insurer's actions, conflicting decisions in asbestos lawsuits made defendant's duties toward the insured unclear -- the defendant could have approached its obligations in a number of ways all of which would have been justified by some case law. Id. With evidence that defendant's decision was legally supportable by the then-existing case law, plaintiff could not prove by clear and convincing evidence that the defendant did not have a reasonable basis for its actions without the jury deciding that the court decisions relied upon by defendant were unreasonable. In affirming the superior court's decision that bad faith did not exist, the Pennsylvania Supreme Court held that "[i]t would be harsh indeed to attribute bad faith to parties which relied on the reasoning and approaches that other courts have found convincing, when there had been no definitive precedent in this jurisdiction." Id. The case does not support defendant's contention that "when an insurer has created a jury issue as to whether its decision to deny a claim was reasonable, the trial court should grant summary judgment with respect to the insured's bad faith claim." Def.'s Mem. of Law in Supp. of Summ. J. at 5.

monthly progress report form regarding his work activity, and that plaintiff tried to conceal the fact that he was working during the period of disability by having his paychecks made out in his wife's name. Defendant claims that these actions constituted a breach of plaintiff's duty of good faith and created a reasonable basis for stopping payments on his benefits claim. Second, defendant states that it had a reasonable basis for denying further benefit payments on the basis of the reports from Dr. Raskin and plaintiff's attending physician.

While it may in fact be true that some of plaintiff's assertions on the monthly progress reports were not true, this does not entitle defendant to summary judgment. Defendant cites three cases to support its contention that plaintiff's alleged misrepresentations to defendant serve as a reasonable basis for denying plaintiff benefits, thus requiring summary judgment on plaintiff's bad faith claim. These cases are factually distinguishable from the instant case. In each of the cited cases, the insurance company denied benefits or rescinded the insurance policy because of misrepresentations made by the insured and discovered by the insurer during its investigations of the claim or application. See Allmerica Fin. Life Ins. & Annuity Co. v. Kepner, No. 96-1154, Slip Op., at 3 (M.D. Pa. Feb. 20, 1998) (insurer sought to rescind policy based on insured's misstatements of medical and financial information on application); Peer v. Minnesota Mut. Fire & Cas. Co., No. 93-2338, 1995 WL 141899 (E.D. Pa. March 27, 1995) (holding that insurer had reasonable basis for denying insured's claims based on evidence of fraud discovered by insurer during its investigation prior to denying insured's claim); American Franklin Life Ins. Co. v. Galati, 776 F. Supp. 1054, 157-58 (E.D. Pa. 1991) (insurer filed suit against insured seeking declaration of right to rescind policy after discovering that insured had lied on insurance application).

Paul Revere, however, does not point to any evidence demonstrating that it relied on perceived misrepresentations (in the form of absent information or misinformation) as the basis, reasonable or not, for its decision to terminate plaintiff's benefits. In its Memorandum of Law in support of its motion for summary judgment, defendant states that it "conducted an extensive investigation into plaintiff's disability claim and concluded that Dr. Greco had misrepresented and deliberately concealed facts regarding his work activities while claiming total disability." Def.'s Mem. of Law at 6. No support in the record is offered for this conclusion. Plaintiff, however, has provided ample testimony to contradict this unsupported statement. Plaintiff has presented the affidavit of Barbara J. Paull, an insurance claims consultant and expert witness, in which she states that attributing any meaning to blanks on an insurance form would constitute bad faith on the part of an insurance company. Pl.'s Counterstatement, Exhibit C, Affidavit of Barbara J. Paull ("Paull Affidavit") at 1. Paull also submits that "if an insurance company develops information that suggests inaccuracies, or is suggestive of material facts which would justify an adverse claims action, the insurance company as fiduciary, has an obligation to its insured to conduct a full investigation prior to taking any adverse claims action." Id. at 2. Joyce Harvey, the first claim representative assigned to handle plaintiff's claim, testified that no investigation of plaintiff's activities was made during the time that she was in charge of the file. See Deposition of Joyce Harvey ("Harvey Dep.") at 76. Lucy Baird, the claim representative who made the decision to terminate plaintiff's benefits, testified that to her knowledge, no one at Paul Revere had investigated whether the work activities listed by plaintiff on his progress reports fell within his occupation such that his payments should be decreased or stopped altogether. See Deposition of Lucy Baird ("Baird Dep.") at 138. Furthermore, based on

plaintiff's submissions, Baird did not question whether he was working within his occupation while claiming to be disabled. See id. at 73. Baird also testified that at the time Paul Revere terminated plaintiff's benefits, and even at the time of the deposition, she was not aware of any information that plaintiff had provided to Paul Revere that was untruthful. See Baird Dep. at 213. Finally, defendant's own letter terminating Greco's disability payments did not mention either bad faith or misrepresentations as the reason for the termination. See Pl.'s Counterstatement, Exhibit A, Attachment B, Letter from Lucy E. Baird to Dominic Greco.

Thus, although evidence exists in the record to support defendant's contention that plaintiff misrepresented facts to the defendant, the evidence supports a finding that this information was obtained after the decision to terminate plaintiff's benefit payments and was not relied upon as a basis for that decision. Plaintiff has presented evidence that could be found by a reasonable factfinder to clearly and convincingly establish that this was not the basis for defendant's actions.

Defendant also asserts that it had a reasonable basis for terminating benefits based on the reports of Dr. Raskin and plaintiff's physician that Greco could work in his own occupation which meant that he was not disabled under the terms of the policy. In opposition, plaintiff has presented the affidavit of Barbara Paull, who opines that Paul Revere's decision to terminate benefits based on an evaluation done by Dr. Raskin was unreasonable. See Paull Affidavit at 8. She concludes that Paul Revere acted unreasonably when it chose Dr. Raskin to conduct the independent medical examination without evaluating his neutrality or checking his credentials, failed initially to provide him with the proper definition of disability as it applied to plaintiff's policy, and failed to determine whether Dr. Raskin had a complete understanding of plaintiff's

occupation (which he admitted in his deposition that he did not). Id.

The deposition testimony of Paul Revere employees Andrew Carlson, Richard Dauphinais, David McDowell, and Lucy Baird as well as Dr. Raskin's testimony and the reasonable inferences drawn therefrom provide additional support for the conclusion reached by Paull and could support a jury finding that defendant recklessly disregarded the fact that Dr. Raskin's report did not provide a reasonable basis for its denial of benefits under plaintiff's policy. See, e.g., Deposition of Richard Dauphinais at 69 (stating that he did not review Greco's file before authorizing termination of benefits); Deposition of Andrew Carlson at 140-47 (testifying that he did not verify Dr. Raskin's qualifications when he chose him to conduct the examination and that he gave incorrect definition of disability to Dr. Raskin); Deposition of David McDowell at 104-07 (describing his review of Dr. Raskin's qualifications); Deposition of David Raskin at 89-90 (stating that at the time of evaluation, he was not familiar with the important functions involved in some aspects of plaintiff's occupation); Baird Dep. at 225 (stating that Dr. Raskin's report was the only information in plaintiff's claim file that supported contention that plaintiff could perform important duties of his occupation). In regard to defendant's claim that reports from plaintiff's physician also supported its conclusion regarding Greco's lack of disability, plaintiff has provided evidence to the contrary in the deposition of Lucy Baird. See Baird Dep. at 134-35, 145-46, 225 (testifying that prior to the inclusion of Dr. Raskin's report, nothing in file supported conclusion that plaintiff was able to perform important duties of his occupation).

Given the examples above and other evidence presented by plaintiff, I conclude that when viewed in the light most favorable to the plaintiff, the non-moving party, enough evidence exists

such that a jury could find by clear and convincing evidence that defendant did not have a reasonable basis for denying plaintiff's benefits and that it knew or recklessly disregarded its lack of a reasonable basis when it ceased payments on plaintiff's claim. Therefore, defendant's motion for summary judgment will be denied. See Klinger v. State Farm Mut. Auto. Ins. Co., 895 F. Supp. 709, 713-15 (M.D. Pa. 1995) (holding that where jury could find insured's actions unreasonable, summary judgment is improper); Montgomery, 836 F. Supp. at 298 (holding that summary judgment is appropriate where plaintiff has failed to establish that reasonable minds could differ as to reasonableness of defendant's denial of benefits).

An appropriate order follows.

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THE PAUL REVERE LIFE INSURANCE COMPANY	:	NO. 97-6317

ORDER

AND NOW, this day of January, 1999, upon consideration of defendant's motion for partial summary judgment as to plaintiff's claims of bad faith in Count II of the complaint and plaintiff's response thereto, IT IS HEREBY ORDERED that the motion for partial summary judgment is DENIED.

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William H. Yohn, Jr., J.